

## 37 Am. Jur. 2d Fraud and Deceit § 9

American Jurisprudence, Second Edition | May 2021 Update

### Fraud and Deceit

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#### I. Overview

##### A. In General; Definitions and Types of Fraud

### § 9. Constructive or legal fraud

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Fraud  1, 6, 7

Constructive fraud includes any act, statement, or omission which amounts to positive fraud or which is construed as a fraud by the courts because of its detrimental effect upon public interests and public or private confidence.<sup>1</sup> Constructive fraud encompasses those breaches which the law condemns as fraudulent merely because they tend to deceive others, violate confidences, or cause injury to public interests, the actor's mental state being immaterial.<sup>2</sup> Constructive fraud is the breach of a legal or equitable duty which the law declares fraudulent because it violates a fiduciary or confidential relationship.<sup>3</sup> It does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose and may be defined as any breach of a duty which gains an advantage for the actor by misleading another to his or her prejudice.<sup>4</sup> Unlike actual fraud, constructive fraud requires neither actual dishonesty nor intent to deceive, being a breach of legal or equitable duty which, irrespective of the moral guilt of the wrongdoer, the law declares fraudulent because of its tendency to deceive others.<sup>5</sup> Constructive fraud consists of: (1) any breach of duty that, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under the person in fault by misleading another person to that person's prejudice or to the prejudice of anyone claiming under that person, or (2) any act or omission that the law especially declares to be fraudulent, without respect to actual fraud.<sup>6</sup> Constructive fraud may consist of a breach of a confidential relationship, which may arise where one person trusts and relies on another, whether the relationship is moral, social, familial, or merely a personal one;<sup>7</sup> it may be found where it can be demonstrated that one party has obtained some benefit from the other through undue influence or breach of a fiduciary or confidential relation.<sup>8</sup> In its generic sense, constructive fraud comprises all acts, omissions, and concealments involving a breach of legal or equitable duty, trust, or confidence that results in damage to another.<sup>9</sup>

Constructive fraud is also defined as an act done or omitted that amounts to positive fraud or is construed as a fraud by the court because of its detrimental effect upon public interests and public or private confidence even though the act is not done or omitted with an actual design to perpetrate positive fraud or injury upon other persons.<sup>10</sup> Otherwise stated, constructive fraud arises by operation of law from a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the existence or evidence of an actual intent to defraud.<sup>11</sup> Sometimes called legal fraud, constructive fraud is nevertheless a fraud although it rests upon presumption and rests less upon furtive intent than does moral or actual fraud.<sup>12</sup> Constructive fraud is inferred by law from the relationship of the parties and the circumstances surrounding them.<sup>13</sup> It is presumed from the relation of the parties to a transaction or from the circumstances under which it

takes place.<sup>14</sup> Constructive fraud arises from a breach of a duty owed ordinarily because of a fiduciary or confidential relationship between the parties;<sup>15</sup> from a breach of duty by one in a confidential or fiduciary relationship to another that induces justifiable reliance by the other to his or her prejudice;<sup>16</sup> or, when a duty under a confidential or fiduciary relationship has been abused or where unconscionable advantage has been taken.<sup>17</sup>

**Observation:**

A distinction which may be found between the terms “constructive” and “legal” as applied to fraud, is that, a breach of a fiduciary relationship or of a contract uberrimae fidei is usually called “constructive fraud,”<sup>18</sup> whereas the term “legal fraud” is generally used to characterize a misrepresentation made without knowledge of its falsity.<sup>19</sup> Constructive fraud merely extends tort liability to recklessly false statements.<sup>20</sup>

Some jurisdictions recognize that constructive fraud may arise in a buyer/seller relationship where: (1) a seller makes unqualified statements to induce another to make a purchase, (2) the buyer relies upon the statements, and (3) the seller has professed to the buyer that he or she has knowledge of the truth of those statements.<sup>21</sup>

## CUMULATIVE SUPPLEMENT

**Cases:**

Under Virginia law, constructive fraud differs from actual fraud in that misrepresentation of material fact is not made with intent to mislead, but is made innocently or negligently although resulting in damage to the one relying on it. [Trustees of Hackberry Baptist Church v. Womack](#), 62 F. Supp. 3d 523 (W.D. Va. 2014).

## [END OF SUPPLEMENT]

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Footnotes

<sup>1</sup> [Joyce v. Morgan Stanley & Co., Inc.](#), 538 F.3d 797 (7th Cir. 2008) (applying Illinois law).

<sup>2</sup> [Texas Integrated Conveyor Systems, Inc. v. Innovative Conveyor Concepts, Inc.](#), 300 S.W.3d 348 (Tex. App. Dallas 2009), review denied, (Feb. 5, 2010).

<sup>3</sup> [Jones v. Thompson](#), 338 S.W.3d 573 (Tex. App. El Paso 2010), review denied, (Apr. 1, 2011).

<sup>4</sup> [Manokoune v. State Farm Mut. Auto. Ins. Co.](#), 2006 OK 74, 145 P.3d 1081 (Okla. 2006).

<sup>5</sup> [Joyce v. Morgan Stanley & Co., Inc.](#), 538 F.3d 797 (7th Cir. 2008) (applying Illinois law); [Shelton v. Kennedy Funding, Inc.](#), 622 F.3d 943 (8th Cir. 2010) (applying Arkansas law); [Harris v. Key Bank Nat. Ass'n](#), 89 F. Supp. 2d 408, 41 U.C.C. Rep. Serv. 2d 1266 (W.D. N.Y. 2000) (applying New York law); [Erkins v. Alaska Trustee, LLC](#), 265 P.3d 292 (Alaska 2011); [Green v. Lisa Frank, Inc.](#), 221 Ariz. 138, 211 P.3d 16 (Ct. App. Div. 2 2009); [Scott System, Inc. v. Scott](#), 996 P.2d 775 (Colo. App. 2000); [Nelson v. Nelson](#), 288 Kan. 570, 205 P.3d 715 (2009); [Eggleson v. Kovacich](#), 274 Neb. 579, 742 N.W.2d 471 (2007); [L & N Partnership v. Lakeside Forest Assn.](#), 183 Ohio App. 3d 125, 2009-Ohio-2987, 916 N.E.2d 500 (10th Dist. Franklin County 2009); [Kincaid v. SouthTrust Bank](#), 221 S.W.3d 32

(Tenn. Ct. App. 2006); *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App. Austin 2000), review denied with per curiam opinion, 53 S.W.3d 684 (Tex. 2001).

6 In re Adoption of S.R.T., 2011 MT 219, 362 Mont. 39, 260 P.3d 177 (2011).

7 In re Estate of Kuykendall, 206 S.W.3d 766 (Tex. App. Texarkana 2006).

8 *Kobritz v. Severance*, 2007 ME 3, 912 A.2d 1237 (Me. 2007).

9 *Assilzadeh v. California Federal Bank*, 82 Cal. App. 4th 399, 98 Cal. Rptr. 2d 176 (2d Dist. 2000); *H-D Irrigating, Inc. v. Kimble Properties, Inc.*, 2000 MT 212, 301 Mont. 34, 8 P.3d 95 (2000); *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 533 S.E.2d 827 (2000).

10 *Loucks v. McCormick*, 198 Kan. 351, 424 P.2d 555 (1967); *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App. Austin 2000), review denied with per curiam opinion, 53 S.W.3d 684 (Tex. 2001).

11 *Demming v. Underwood*, 943 N.E.2d 878 (Ind. Ct. App. 2011), transfer denied, 962 N.E.2d 647 (Ind. 2011).

12 *Fire Ass'n of Philadelphia v. Vantine Paint & Glass Co. of Bismarck*, 133 N.W.2d 426 (N.D. 1965); *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, 987 P.2d 1185 (Okla. 1999).

13 *Yeager v. McManama*, 874 N.E.2d 629 (Ind. Ct. App. 2007).

14 *Fire Ass'n of Philadelphia v. Vantine Paint & Glass Co. of Bismarck*, 133 N.W.2d 426 (N.D. 1965); *Perlberg v. Perlberg*, 18 Ohio St. 2d 55, 47 Ohio Op. 2d 167, 247 N.E.2d 306 (1969); *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App. Austin 2000), review denied with per curiam opinion, 53 S.W.3d 684 (Tex. 2001).

15 *Clausen v. National Geographic Soc.*, 664 F. Supp. 2d 1038, 252 Ed. Law Rep. 753 (D.N.D. 2009), aff'd, 378 Fed. Appx. 595 (8th Cir. 2010) (applying North Dakota law); *McFadden Ranch, Inc. v. McFadden*, 19 Neb. App. 366, 807 N.W.2d 785 (2011).

16 *Assilzadeh v. California Federal Bank*, 82 Cal. App. 4th 399, 98 Cal. Rptr. 2d 176 (2d Dist. 2000); *Epperly v. Johnson*, 734 N.E.2d 1066 (Ind. Ct. App. 2000).

As to abuse of a confidential or fiduciary relationship as perpetration of fraud, see § 34.

As to the presumption or inference of fraud from a confidential or fiduciary relationship, see § 462.

17 *American Honda Motor Co., Inc. v. Motorcycle Information Network, Inc.*, 390 F. Supp. 2d 1170 (M.D. Fla. 2005) (applying Florida law).

18 *Brasher v. First Nat. Bank*, 232 Ala. 340, 168 So. 42 (1936); *Mary Pickford Co. v. Bayly Bros.*, 12 Cal. 2d 501, 86 P.2d 102 (1939).

19 *Fire Ass'n of Philadelphia v. Vantine Paint & Glass Co. of Bismarck*, 133 N.W.2d 426 (N.D. 1965); *Wilson v. Mid-State Homes, Inc.*, 53 Tenn. App. 520, 384 S.W.2d 459 (1964).

20 *Curtis Lumber Co., Inc. v. Louisiana Pacific Corp.*, 618 F.3d 762 (8th Cir. 2010) (applying Arkansas law).

21 *Digitech Computer, Inc. v. Trans-Care, Inc.*, 646 F.3d 413 (7th Cir. 2011) (applying Indiana law); *American Heritage Banco, Inc. v. Cranston*, 928 N.E.2d 239 (Ind. Ct. App. 2010).